Supreme Court, U.S.
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NO. 85-491

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1985

ANTHONY RAZZANO, EARNEST WALLACE,
JOE TIPPETT, d/b/a T & W TRUCKING COMPANY,

Petitioners,

vs.

DUNLOP TIRE & RUBBER CO., INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Fourth Circuit Court of Appeals properly affirmed the trial court's dismissal of the strict liability claim invited by the error of the petitioners.

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PARTIES TO THE PROCEEDING

The parties to the proceeding are Anthony Razzano, Earnest Wallace, Joe Tippett, d/b/a T&W Trucking Company, and Dunlop Tire and Rubber Co., Inc. The correct corporate name of the respondent is Dunlop Tire and Rubber Corporation. Dunlop Tire and Rubber Corporation is an indirect subsidiary of Dunlop Holdings PLC.

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STATEMENT OF THE CASE

This is a product liability action filed by the petitioners against Dunlop Tire & Rubber Co., Inc. (hereinafter referred to as "Dunlop"), the manufacturer of a tube--type truck tire. The complaint in this action was filed on July 2, 1982. (J.A. 11-20)* It did not allege where the accident complained of occurred, but the allegations of the petitioners, North Carolina residents, implied it happened in North Carolina. In its initial response to the complaint, filed on August 16, 1982 Dunlop moved for a motion to dismiss the strict liability claim in the complaint (J.A. 21) along with a Memorandum of Law in Support of that motion (J.A. 27). Dunlop's Memorandum

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*J.A. represents the Joint Appendix filed with the United States Court of Appeals for the Fourth Circuit.

of Law assumed the accident occurred in North Carolina and simply pointed out that this cause of action does not exist in this state.

Counsel for petitioners did not submit a written memorandum in response to that motion and on September 30, 1982, when the motion to dismiss came on for hearing before the district court, counsel for the petitioners did not cite any authority or offer any factual argument in opposition to the motion. Thereafter, the court drafted and entered an order dismissing the strict liability claim. This order was executed and filed on the day of the hearing and stated in part that the petitioners had agreed to a dismissal of this count. (J.A. 32). On October 4, 1982, the petitioners' attorney wrote a letter to United States District Judge Robert D. Potter regarding the wording of the court's order dismissing

the strict liability claim.[1] That letter reads in part as follows:

> I do concede that the present status of North Carolina law will not allow me to proceed on a strict liability theory in this case, and to that extent concede that a dismissal is proper.

For the first time on the day of trial petitioners asserted to the court that the accident occurred just over the state line in Tennessee, not North Carolina, and that a new cause of action based upon Tennessee's law of strict liability should be added to the suit. Petitioners' counsel admitted he was dilatory in bringing the new facts on which his motion was based to the court's attention:

> and I will accept the responsibility for being dilatory about that. There is absolutely nothing I can say in that regard other than I am and I have no excuse and I don't propose to offer one. (J.A. 91).

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[1] The letter by petitioners' attorney was made a part of the Joint Appendix by order of the Fourth Circuit dated January 28, 1985.

Based on the facts before it, the trial court concluded that it would be unfair to allow the petitioners on the day of trial to assert a new theory of recovery and denied petitioners' motion as follows:

> All right, sir. Mr. Chandler, if we allow people to come in here and change the theory, particularly after the time that you've had to advise the court or make the motion based on mistake, the other party is never going to be able to prepare his defense. . .(J.A. 94).

The trial lasted over a week and consisted of testimony, most of it by experts about the tire, which gave the jury an exhaustive view of how and why the tire failed. The case was presented to the jury on the issue of Dunlop's negligence. The jury believed the evidence offered by Dunlop and returned a verdict finding that Dunlop was not negligent in the manufacture of the tire. (J.A. 77-78) The trial court entered judgment on November 30, 1983 and by order dated January 17, 1984, the district court denied petitioners' motion for judgment

notwithstanding the verdict or in the alternative for a new trial. (J.A. 86-88)

On appeal before the Fourth Circuit, the petitioners asserted in a shotgun approach that the trial court committed numerous errors of law. Among the many arguments posed to the court, the petitioners argued that the strict liability claim was improperly dismissed. The panel of the Court of Appeals hearing this appeal correctly stated with respect to this allegation that the petitioners had never opposed the dismissal of the strict liability claim:

> Plaintiffs did not oppose Dunlop's motion to dismiss their strict liability claim. Rather, they waited until a year had passed and the day of trial had arrived to assert that their strict liability claim should be reinstated. Plaintiffs offered no reason for their delay.

Razzano v. Dunlop, Slip. Op. No. 83-2181, p. 4, p. 7 (4th Cir. April 16, 1985) (Pet. A. 11a.) The panel then stated that it was

"firmly convinced" that the district court's refusal to permit amendment on the day of trial was a proper exercise of the trial court's discretion and not an abuse of discretion. (Pet. A. 12a)

On April 24, 1985, the petitioners submitted a petition for rehearing or in the alternative, suggestion for rehearing in banc. The petitioners enumerated seventeen reasons for this requested relief, among them its claim that the strict liability count was improperly dismissed. On July 1, 1985, the petitions for rehearing and for rehearing in banc were denied. This matter is before this court on petition for writ of certiorari.

SUMMARY OF ARGUMENT

It is a fundamental principle that litigants are barred from raising on appeal issues not properly raised before the trial court below. Petitioners are foreclosed from challenging the dismissal of the strict

liability claim because they failed to oppose the motion seeking its dismissal and conceded that the dismissal of that claim was proper. The Federal Rules of Civil Procedure require that a party make known to the court its objections to any action by the court and the grounds in support of each objection in order to preserve an objection for appeal. Petitioners failed to object and were dilatory in bringing the facts before the court which would have presented a basis for a different ruling. Having consented to the court's action, petitioners cannot now complain about an error which they invited the court to commit.

ARGUMENT

I. Petitioners Have Not Stated Sufficient Considerations In Their Petition To Invoke This Court's Discretion For Review On Writ of Certiorari.

Rule 17 of the Rules of the Supreme Court of the United States sets forth specific considerations governing review on

certiorari. Petitioners asserted as a reason for granting the writ that "the judgment of the District Court and the affirmation of that judgment by the United States Court of Appeals (Judge Widener dissenting) overlooks or ignores all existing case law and is in obvious conflict with prior decisions of the United States Supreme Court." (Pet. B. 6-7) Petitioners do not point to any specific cases, however, that are in conflict with the opinions below but instead rely upon their mischaracterization of the facts to support their position in this petition. The opinions below are not inconsistent with the cases cited by the petitioners regarding the substantive rights of parties injured in the State of Tennessee. Rather the opinions below are consistent with those cases as well as the rules and cases which prevent a party from leading a court into error to benefit from the mistake. There is no dispute that Tennessee

has a statute recognizing a cause of action in strict liability. There is no dispute that North Carolina adheres to the choice of law rule of lex loci delicti. Yet the failure to offer petitioners the remedy of strict liability by application of the doctrine of lex loci delicti does not conflict with those cases which apply that doctrine. The facts in the case at bar are quite different because petitioners failed to set forth for the court the essential facts -- the fact that the accident occurred in Tennessee -- in order for the court to apply the lex loci delicti rule. The opinions below, therefore, do not conflict with any of the decisions of any federal courts of appeals on the same subject matter, nor do they raise any important questions of federal law which have not been, but should be settled by this Court.

II. The Court Of Appeals Properly Affirmed The Trial Court's Dismissal Of The Strict Liability Claim Invited By The Error Of The Petitioners.

Rule 46 of the Federal Rules of Civil Procedure dispenses with the requirement that a party make a formal exception on the record to rulings or orders by the court. This rule, however, does require an affirmative act by a party to preserve an error for appeal:

> [I]t is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; (Emphasis added.) FED. R. CIV. P. 46.

Accordingly, it is "necessary for the party to make it clear to the court that he objects to the court's action, and to state the grounds on which he bases his objection, in order that the defect may be obviated, if possible. . . ." 5A J. Moore, Moore's Federal Practice, ¶ 46.02 (2d Ed. 1976). As pointed out in Bucy v. Nevada Const Co., 125

F.2d 213, 218 (9th Cir. 1942) regarding the early discussions of Rule 46:

> The function of an exception was to bring pointedly to the attention of the trial judge the importance of the ruling from the standpoint of the lawyer and to give the trial judge an opportunity to make further reflection regarding his ruling. Proceedings of Institute, Washington, D.C., 1938, P. 87. In justifying the rule it was stated 'the exception is no longer necessary, if you have made your point clear to the court below.' Proceedings of Institute, Cleveland, 1938, P. 312. 'But of course it is necessary that a man should not spring a trap on the court. . ., so the rule requires him to disclose the grounds of his objections fully to the court.' Proceedings of Institute, Washington, D.C., 1938, P. 124; see also P. 87.

As stated in Rudick v. Prineville Mem. Hosp., 319 F.2d 764 (9th Cir. 1963), the requirements of Rule 46 that a party make known to the court his objections to the court's action is not a mere technicality but has a genuine purpose which is "essential to the orderly administration of justice." 319 F.2d at 770. In that case,

the appellant was foreclosed from complaining on appeal about the actions of the trial court which were not objected to by that party. See also Codex v. Milgo Electronic Corp., 717 F.2d 622, (1st Cir. 1983), cert. den., 104 S.Ct. 1719 (1984), (no objection to the action of the district court at the time of the ruling on Codex's motion for summary judgment, although it had an opportunity to do so, forecloses review of the issue).

Application of these principles to the facts under consideration by this Court make it clear that the petitioners failed to comply with the purpose of Rule 46 of the Federal Rules of Civil Procedure. At the hearing before the trial court on Dunlop's motion to dismiss the strict liability claim, the petitioners conceded the issue and caused the court to enter an order dismissing the strict liability claim on that basis. The petitioners failed to

oppose the motion to dismiss either by brief or oral argument. This failure to make known, at the time the matter was properly before the trial court, the basis of petitioners objection, if any, forecloses appellate review of that issue.

Under the doctrine of "invited error," 5 Am.Jr.2d Appeal and Error §713 (1962), a party against whom a ruling is made will not be allowed to contend for the first time on appeal that the ruling was error when the trial ruling was caused by the neglect of that party, or where that party led the court into error. In order for the doctrine to apply, "it is sufficient that the party who on appeal complains of the error has contributed to it." 5 Am.Jur.2d Appeal and Error §713 (1962). Here petitioners contributed to the error by neglecting or omitting to bring to the trial court's attention that there was a factual basis - the accident happening in Tennessee - to support a strict

liability claim. Indeed, petitioners' counsel's October 4, 1982 letter to the trial court shows petitioners believed North Carolina law applied to the strict liability issue. Having failed to bring the pertinent underlying facts to the court's attention, facts which were at that time peculiarly within petitioners knowledge, petitioners cannot now complain on appeal. See Byrd v. Wolff, 490 F.2d 1277 (8th Cir. 1974) (factual issue not before trial court at time of motion for summary judgment could not be raised on appeal).

CONCLUSION

For the reasons set forth above, respondent respectfully requests that the court deny the petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

This the 10 day of October, 1985.

HELMS, MULLISS & JOHNSTON

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Brief in Opposition to Petition For Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit by mailing three copies thereof, first-class postage prepaid, to:

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This 10 day of October, 1985.

W. Donald Carroll, Jr.